United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

485A

No. 20,177

LEONARD P. BLACKWELL,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM J. GARBER
412 Fifth Street, N. W.
Washington, D. C. 20001

Counsel for Appellant

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INDICTMENT

The Grand Jury charges:

On or about March 23, 1965, within the District of Columbia, Leonard P. Blackwell did sell, barter, exchange and give away to Patricia Ann Parks, a narcotic drug, that is, twenty-nine capsules containing a mixture totaling about 758 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Patricia Ann Parks, as provided by law.

SECOND COUNT:

On or about March 23, 1965, within the District of Columbia, Leonard P. Blackwell purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, twenty-nine capsules containing a mixture totaling about 758 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about March 23, 1965, within the District of Columbia, Leonard P. Blackwell facilitated the concealment and sale of a narcotic drug, that is, twenty-nine capsules containing a mixture totaling about 758 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported into the United States contrary to law, with the knowledge of Leonard P. Blackwell.

This is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment.

FOURTH COUNT:

On or about March 25, 1965, within the District of Columbia, Leonard P. Blackwell purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, six capsules containing a mixture totaling about 292 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol.

FIFTH COUNT:

On or about March 25, 1965, within the District of Columbia, Leonard P. Blackwell facilitated the concealment and sale of a narcotic drug, that is, six capsules containing a mixture totaling about 292 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported into the United States contrary to law, with the knowledge of Leonard P. Blackwell. This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment.

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant, by and through his attorney, and moves the Honorable Court for an order suppressing as evidence against the defendant, in any criminal proceeding, the items set forth in Counts Four and Five of the Indictment, and as reasons therefore, states as follows:

1. The affidavits in support of the search warrant were insufficient

to sustain the issuance of the warrant. The source identified as Patricia Ann Parks was a source whose prior reliability as an informant was not shown. The rest of the affidavit of Officer Paul nowhere mentions the address of 838 Chesapeake save for the last three paragraphs of the said affidavit which contains innocuous matter.

2. The warrant for the premises (Commissioner's Docket 16, Case 345) was not executed in accordance with law, in that, among other things, the entry into the apartment 838 Chesapeake Street, S.E., Apt. 101, was illegal.

3. The search of the aforementioned premises was against the will and without the consent of the defendant.

4. The search and seizure were otherwise in violation of defendant's rights under the Fourth and Fifth Amendments of the U.S. Constitution.

5. Matters and things listed in the inventory of property allegedly taken pursuant to the warrant were matters and things not properly within matters and things which could be seized pursuant to the execution of a warrant.

AFFIDAVIT OF DETECTIVE PAUL

Narcotic Squad, MPDC
March 24, 1965

AFFIDAVIT IN SUPPORT OF A U.S. COMMISSIONERS SEARCH WARRANT FOR THE PREMISES 838 Chesapeake Street SE, Washington, D.C., Apt. 101 occupied by Leonard P. Blackwell.

About 4:20PM on March 23, 1965 Detective Paul along with other members of the

narcotic squad executed a U.S. Commissioners search warrant at the premises 709 Massachusetts Avenue NE, Apt. 5. At the time of the execution of the warrant twenty nine capsules of a white powder were seized, and Patricia Ann Parks was charged with violation of the Harrison Narcotic Act. Parks stated that she had received the capsules from Leonard Paul Blackwell on the evening of March 22, 1965 while she was at his home at 838 Chesapeake Street SE, Apt. 101.

Later at the narcotic squad office Detective Paul performed a preliminary field test on the white powder in one of the capules and received a positive color reaction indicating the presence of a narcotic drug of the opiate group.

Prior to March 23, 1965 Detective Paul had received information from previously reliable sources of information who had stated that Leonard Paul Blackwell was selling heroin. Detective Paul had observed Blackwell out in the streets in the vicinity of 14th and U Streets NW in the company of narcotic law violators and narcotic drug users. During the early part of 1964 Detective Paul had received information that Blackwell was selling heroin out of 1612 T Street NW.

The undersigned officer has received information from Detective Sgt. Didone that Sgt Didone had received information from previously reliable sources who stated that Leonard Paul Blackwell was dealing in illicit narcotic drugs. Det. Didone also advised the undersigned that he had personally observed Blackwell in the company of narcotic law violators hanging out in area where there is heavy narcotic drug traffic.

The undersigned officer has received information from Detective Joseph Somerville that he has seen Blackwell in the vicinity of 14th and U Streets NW in the company of narcotic law violators and known narcotic drug users.

The undersigned officer has been advised by Agents John Thompson and Walter Morris of the Federal Bureau of Narcotics that they have seen Blackwell in the company of narcotic law violators. In 1964 Detective Paul received information from Agent Morris, that Agent Morris was investigating Blackwell at 1612 T Street NW after he had received information from a previously reliable source that Blackwell was involved in the illicit narcotic drug traffic.

Files of the Federal Bureau of Narcotics reveal that in February of 1964

a 1960 Cadillac, DC tags XD953 was observed in New York City and that Matthew Weaver, a narcotic law violator, was in the vehicle. This vehicle is listed to Leonard P. Blackwell.

Investigation reveals that phone 5612360 is listed to the premises 838 Chesapeake Street SE, Apt. 101.

The premises 838 Chesapeake Street SE, Apt. 101 is listed to a Margaret J. Young. Leonard Paul Blackwell has listed Margaret Young as being his sister.

Because of the information received from previously reliable sources along with the information received from the above-named Police Officers, along with the events of March 23, 1965 the undersigned does believe that there is now illicit drugs (narcotic) being secreted inside of Apt. 101 of 838 Chesapeake Street, S.E. Washington, D.C. Occupied by Leonard Paul Blackwell.

/s/
Det. David Paul, Narcotic Sq. MPDC

Subscribed to and sworn to this 24th day of March, 1965 before me.

/s/
Sam Wertleb, U.S. Commissioner
for the D. of C

AFFIDAVIT OF PATRICIA ANN PARKS

Narcotic Squad, MPDC
March 23, 1965

AFFIDAVIT OF PATRICIA ANN PARKS RELATIVE TO THE ILLICIT NARCOTIC DRUG ACTIVITIES of Leonard Paul Blackwell at the premises 838 Chesapeake Street SE, Apt. 101.

About one month ago I needed some money so I went to Leonard Paul

Blackwell, because I had heard that he was selling heroin and I thought that he would give me some heroin to sell. I had known Blackwell for about two years and over the years I had heard that he was selling drugs. One one occassion Blackwell had given me his address. I went to Blackwell's house at 838 Chesapeake Street SE, Apt. 101 and talked to him about selling heroin for him. Blackwell told me that he would think it over and he then gave me his phone number 5612360 and told me to call him in a couple of days. A few days after going to his house I called him and Blackwell told me to come to the house and get it. I then went to his house at 838 Chesapeake Street, SE, Apt. 101 and Blackwell gave me a glassine envelop containing fifty capsules. He told me to sell the fifty capsules for $2.00 apiece and that he wanted $70.00 and I could keep the rest. Since that time I have been going to Blackwell's apartment every day and getting a bag of fifty capsules of heroin from him to sell. I would always give him his $70.00 from the previous days capsules before he gave me a new supply. When I went to the apartment Blackwell always had the heroin in the premises. I would sell the capsules around 14th and U Streets NW, and some of the capsules I would use for myself. At times when I went to Blackwell's apartment I would see capsules other than the fifty that he gave me. One day last week I saw at least two hundred capsules laying on the bed in his apartment.

About 9PM on March 22, 1965, I went to 838 Chesapeake Street SE, Apt. 101 where I gave Blackwell $70.00 for the previous days capsules and he handed me fifty capsules in a glassine envelope.

About 4:20PM on March 23, 1965, Detective Paul and other officers of the Narcotic Squad came to my apartment at 709 Massachusetts Avenue NE with a search warrant. They found a glassine envelope containing twenty-nine capsules in the apartment. These twenty-nine capsules are the remains of the fifty capsules which I had received from Blackwell on March 22, 1965.

Detective Paul showed me a picture of Leonard Paul Blackwell, MPDC photo #132146 and this is the same person that I have been getting my heroin from at 838 Chesapeake Street SE, Apt. 101.

/s/
Patrician Ann Parks

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24th DAY OF MARCH 1965

/s/
SAM WERTLEB
U.S. Commissioner for the
District of Columbia

MOTION TO INSPECT GRAND JURY MINUTES

Comes now the defendant, Leonard P. Blackwell, by and through his attorney, and moves the Honorable Court for an order directing the Government to produce for inspection by the defendant his counsel, the minutes of the Grand Jury which heard the evidence leading to the present indictment, and as reasons therefore, states as follows:

1. Factual Background

The Defendant has been indicted in Five (5) Counts of an indictment alleging a transaction with one Patricia Ann Parks in Counts One, Two and Three and an alleged transaction, separate and distince, in Counts Four and Five.

It seems that on or about March 23, 1965, officers of the Narcotic Squad, Metropolitan Police Department, executed a search warrant for premises 709 Massachusetts Avenue, N. W., Apt. 5. (See Commissioner's Docket 16, Case 340). One Patricia Ann Parks (previously known only as Jane Doe) was arrested at the time of the execution of the search warrant and charged with violation of the Harrison Narcotic Act. She was taken before the United States Commissioner on March 24, 1965 (Case 344). It is alleged that at the time of the search of the Massachusetts Avenue premises, twenty-nine capsules of a white powder were seized.

The officers of the Narcotics Squad state that Patricia Ann Parks claims to have secured these capsules from defendant, Blackwell, and in fact, an affidavit was secured from the person of Patricia Ann

Parks to this effect. (Commissioner's Docket 16, Case 345) The affidavit was subscribed and sworn to by the U. S. Commissioner, Sam Wertleb on March 24, 1965. This affidavit was used in support for the search warrant for premises 838 Chesapeake Street, S. E., Washington, D. C., upon which Counts Four and Five of the Indictment are based.

The situation then is that Patricia Ann Parks, being arrested for violation of the Harrison Narcotic Act is brought before the United States Commissioner and swears to what amounts to a confession of her alleged possession of heroin on March 23, 1965.

This defendant, Leonard P. Blackwell, is subsequently arrested during the execution of the search warrant at the Chesapeake Street address, supported by the alleged confession-affidavit of Patricia Ann Parks.

The case of Patricia Ann Parks remains pending before the U. S. Commissioner until July 1, 1965 when it is dismissed.

On the date of July 1, 1965, Patricia Ann Parks is charged in the District of Columbia Court of General Sessions, Criminal Division with the crime of Possession of Narcotic under the Uniform Act (the narcotic being heroin on the date of March 23, 1965). A plea of not guilty is entered and a demand for trial by jury is made. The case is set for trial on the misdemeanor charge for July 22, 1965. On July 15, 1965, Patricia Ann Parks enters a plea of guilty to the misdemeanor charge and receives a sentence of 120 days. All of which appears in

Criminal No. U. S. 5717-65 D. C. Court of General Sessions.

In the meantime, it appears that on June 19, 1965, Patricia Ann Parks was charged with Vagrancy Under the Uniform Narcotic Drug Act in the District of Columbia Court of General Sessions, Criminal Division. The case is continued at the request of the Government until June 24, 1965, at which time a plea of not guilty is entered and a jury trial is demanded. The case is set for trial by jury on July 22, 1965. On July 15, 1965 (the same date as the plea of guilty in U.S. 5715-65, above), the Vagrancy charge is "nolle prossed" by Lumbard, Assistant U.S. Attorney. All of which appears in Criminal No. U.S. 5317-65 D.C. Court of General Sessions.

On July 19, 1965, the Grand Jury returns the indictment in the present case with Patricia Ann Parks being the principal witness in Counts One, Two and Three.

2. Argument

Defendant, Blackwell, contends that in view of the above-factual background, there is a particularized need for the inspection of the Grand Jury minutes in this case. It is apparent that the gist of the Government's case against defendant on Counts One, Two and Three will depend upon Patricia Ann Parks. This is the same person who is arrested on what appears to be a perfectly good Harrison Narcotic Act Case and is allowed to plead guilty to a misdemeanor on the same act. It is the same person who attempts to incriminate this defendant and appears to

be the only witness against him on the first three counts of the indictment.

Many questions arise: Did Patricia Ann Parks personally appear before the Grand Jury? Was only her affidavit in Commissioner's Docket 16, Case 345 read to the Grand Jury? Were any promises made to her to induce her to give evidence favorable to the Government? What evidence, other than her testimony, did the Grand Jury have on Counts, One, Two and Three of the Indictment? Was any intimidation or coercion used to persuade her to become a Government witness?

Defendant submits that these questions should not go unanswered because of the veil of Grand Jury secrecy. There is no need for secrecy in this case because the principal accuser has been named in the indictment. The factual background of what happened to her own case (the case of Patricia Ann Parks) is a matter of public record, both in this Court and in the District of Columbia Court of General Sessions.

Against this, is the need for the defendant to adequately prepare his defense and further to determine whether the Grand Jury considered invalid evidence and was biased and hostile to this defendant.

The particularized need doctrine announced by the Supreme Court of the United States in United States v. Proctor & Gamble Co. 356 U.S. 677 is one which has troubled Courts, in counsel's view, but counsel for defendant submits that in view of the background presented here and on the basis of testimony which may be adduced at the hearing of this motion, defendant and counsel are entitled to an inspection of

the Grand Jury minutes.

Note: For an excellent discussion of this problem direction is made to University of Pennsylvania Law Review, Vol. 111, No. 8, page 1154, June 1963, Disclosure of Grand Jury Minutes To Challenge In-Dictments and Impeach Witnesses in Federal Criminal Cases.

MOTION FOR PRE-TRIAL HEARING OF GOVERNMENT WITNESS

Comes now the defendant, by and through his attorney, and moves the Honorable Court for an order for a pre-trial hearing of the Government witness, Patricia Ann Parks, to determine the circumstances under which said witness, gave the affidavit in Commissioner's Docket 16, Case 345, and on the admissibility of her testimony in the trial of this case and a determination of whether her evidence was procured by coercion violative of the constitutional rights of said witness and therefore is inadmissible against this defendant under the Fifth Amendment of the U. S. Constitution.

For the factual background of said Patricia Ann Park's relationship with the instant case, counsel refers the Court to the factual discussion set forth in the Motion To Inspect Grand Jury Minutes, filed herein.

In support of the legal justification for such a hearing and determination counsel respectfully directs the attention of the Court to the cases of United States v. Wolfe, 307 F.2d 798; Turner v. Pennsylvania, 338 U.S. 62; and to the excellent discussion of this

novel problem in 57 Northwestern University Law Review, commencing at page 549.

Counsel submits that this is a matter which can be heard and determined prior to the trial of this case, and therefore counsel prays that this motion be granted.

MOTION FOR SEVERANCE OF COUNTS

Comes now the defendant, Leonard P. Blackwell, by and through his attorney, and moves the Honorable Court for an order, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, granting a severance of Counts One, Two and Three of the Indictment from Count Four and Five of the Indictment and for election, separate trial or other relief, and as reasons therefore states:

1. That the allegations contained in Counts One, Two and Three of the Indictment involve alleged offenses concerning one Patricia Ann Parks on March 23, 1965.

2. That it appears from the Indictment that Counts One, Two and Three charge separate and distinct alleged transactions from Counts Four and Five, not by the same evidence and not resulting from the same series of alleged acts.

3. That the defenses to each of the two alleged transactions will, of course be different.

4. That the defendant feels that he would be embarrassed and confounded in rendering a proper defense to each of the charges in a

single trial before a single jury and would be denied a fair and impartial trial by virtue of the joinder of the five Counts in a single indictment.

For these and other reasons as may be advanced at the hearing of this motion, defendant prays that this motion be granted.

JUDGMENT AND COMMITMENT

On this 22nd day of April, 1966 came the attorney for the government and the defendant appeared in person and by counsel, William J. Garber, Esquire;

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of

Violation of Title 26, United States Code, Sections 4505a, 4704a

and Title 21, United States Code, Section 174

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Seven (7) years on Count One;
One (1) year to three (3) years on Count Two;
Seven (7) years on Count Three;
One (1) year to three (3) years on Count Four;
Seven (7) years on Count Five,
Said sentences by the Counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joseph C. McGarraghy
United States District Judge

NOTICE OF APPEAL

Name and address of appellant Leonard P. Blackwell, D.C. Jail

Name and address of appellant's attorney William J. Garber
412 Fifth Street, N.W., Washington, D.C. 20001

Offense Violation of Federal Narcotics Laws

Concise statement of Judgment or Order, giving date, and any sentences

Judgment Guilty, sentenced to concurrent terms totally Seven (7) years. Date of sentence April 22, 1966.

Name of institution where confined, if not on bail D.C. Jail.

I, the above named appellant, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the above stated judgment.

April 29, 1966
Date

Appellant

/s/ William J. Garber
Attorney for Appellant

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,177

LEONARD P. BLACKWELL,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM J. GARBER
412 Fifth Street, N.W.
Washington, D.C. 20001

Counsel for Appellant

QUESTIONS PRESENTED

1. Whether a motion to suppress should have been granted when the accompanying affidavit in support of a search warrant for premises was from a source whose reliability was neither alleged nor established?

c 2. Whether a severance and separate trials should have been granted when it appears that the evidence going toward the first three counts of the indictment were separate and distinct from the remaining two counts and that the appellant was deprived of a freedom of choice as to whether or not to testify and would be embarrassed and confounded in presenting his defense?

3. Whether appellant was entitled to the Grand Jury minutes of the only witness establishing appellant's connection with Counts One through Three of the Indictment, where considerations of Grand Jury secrecy were minimal and whether the Trial Judge's en camera inspection of the minutes was sufficient?

4. Whether appellant was entitled to a judgment of acquittal wherein the first three counts of an indictment were predicated upon the testimony of one witness, admittedly a user and seller of narcotics, and where it appeared that such witness' constitutional rights had been violated, and where the evidence as to the remaining counts was speculative and conjectural?

5. Whether evidence in the nature of three empty capsules was properly admitted into evidence, which capsules were not the subject of the indictment and no testimony as to chemical analysis was permitted, and therefore was prejudicial?

6. Whether the appellant was prejudiced by the Trial Court's allowance, over objection, of the testimony of the witness, Patricia Ann Parks, as to alleged transactions with the appellant which were not contained in the indictment?

7. Whether the ruling of the Trial Judge that if the appellant took the witness stand during the hearing on the renewal of the motion to suppress, out of the presence of the jury, his cross-examination would not necessarily have been limited to the areas about which he would testify to on direct, was proper?

8. Whether the alleged statements of appellant at the time of his arrest, during the execution of the search warrant, were properly admissible in view of the claim of illegal search and seizure?

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TABLE OF CASES

(*Cases preferably relied upon)

IN THE
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Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the defendant, Leonard P. Blackwell, in the Court below, from a judgment of conviction by a jury on five (5) counts of an indictment charging violations of Title 26-4704a and Title 26-4705a and Title 21-174 of the United States Code. The District Court below had jurisdiction by virtue Title 11-521(a) (2), District of Columbia Code, 1961 Edition, as amended. The jurisdiction of this Court is conferred by virtue of the provisions of Title 28-1291 of the United States Code.

STATEMENT OF THE CASE

It appeared from the evidence that on March 23, 1965, officers of the Narcotics Squad of the Metropolitan Police Department, armed with a United States Commissioner's Search Warrant, went to premises 709 Massachusetts Avenue, N.E., Apartment 5, in the District of Columbia and during the execution of the search warrant, seized twenty-nine (29) capsules of alleged heroin and arrested one Patricia Ann Parks. Parks was charged with violation of the Harrison Narcotic Act and taken to Police Headquarters. While at Police Headquarters, the officers prepared an affidavit in which it was set forth that Parks had received heroin from the appellant on March 22, 1965. The affidavit recited that she received a total of fifty (50) capsules, of which twenty-nine (29) were left at the time of her arrest.

On March 24, 1965, the same Patricia Ann Parks was brought before the United States Commissioner on the Harrison Narcotic Act charge. She had no attorney at that time. After being advised of her rights, a continuance of her case before the Commissioner was given. After her appearance before the Commissioner, she swore to the affidavit prepared by the police officers, the Commissioner taking her oath. It should be pointed out that this affidavit was in fact a confession of the Harrison Act violation subscribed by the officer charged with the duty of advising her of her rights. A search warrant for premises 838 Chesapeake Street, S.E. was obtained.

On March 25, 1965, armed with the search warrant, the officers went to the premises of 838 Chesapeake Street, S.E., obtained a key to

the apartment 101 from the janitor and the officers testified that after knocking and identifying themselves, and receiving no response, they let themselves into the apartment. The officers found appellant and his wife in one of the bedrooms and another adult and some children in another bedroom. They also testified, over objection, as to finding two or three empty capsules in the bedroom where appellant was. They also claimed that they found six capsules in a couch in the living room of the apartment. They testified that appellant was asked about the capsules and over objection they were permitted to testify that appellant replied that before he would admit they were his he would have to think about it. Appellant was charged with the possession of these capsules.

During the course of the trial when the motion to suppress evidence was renewed, appellant desired to take the stand out of the presence of the jury to testify concerning the officer's entry into the apartment. Receiving no satisfactory assurance that his cross-examination would be limited to the issue of the execution of the search warrant, appellant did not testify.

Also appellant wanted to testify on the last Two Counts of the indictment, which concerned the six capsules allegedly found in the apartment. There was no assurance that his cross-examination would be limited to the issue involved (namely Counts Four and Five). Therefore, appellant did not testify.

The sole witness to Counts One, Two and Three (excluding the

chemist and the officers) implicating appellant with the sale of narcotics to Parks was the witness Patricia Ann Parks. It was brought out that the Harrison Act charge was eventually dismissed before the U.S. Commissioner and she was permitted to plead guilty to a misdemeanor in the District of Columbia Court of General Sessions. Parks admitted drug addiction. Parks' testimony was that appellant had given narcotics to her to sell and the money obtained was to be divided in some fashion. There was no corroboration at to Parks' testimony.

The sole witness for the defense, was one Linett Watts, who testified that she was in one of the bedrooms at the Chesapeake Street address when the officers came in. She testified that while she was in the living room one of the officers searched the couch (where capsules were allegedly found) and found nothing. Later, when appellant and she left the living room she stood in a hallway and observed one of the officers go to the couch and state that capsules had been found. One of the other officer stated that six had been found although the witness inferred that he could not see the capsules. She indicated that the capsules were in the palm of the hand of Officer Paul.

The appellant did not testify in view of the ruling of the Court concerning the scope of his cross-examination if he so testified.

Motions for judgment of acquittal were made at the close of the Government's case and at the close of all of the evidence and these motions were denied. After instruction, the jury convicted the appellant of all counts of the indictment and he was sentenced to a total of

seven years.

STATUTES INVOLVED

The provisions of Title 21 U.S.C. Section 174, provide as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale or any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned (as provides) (Parenthesis added)"

The Provisions of Title 26 U.S.C. Section 4704(a) provide as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps shall be prima facie evidence of a violation of the subsection by the person in whose possession the same may be found."

The Provisions of Title 26 U.S.C., Section 4705(a) provide as follows:

> "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF POINTS

1. The Lower Court erred in denying appellant's motion for suppression of the evidence made before trial and renewed during trial.

2. The Lower Court erred in denying appellant's motion for

severance made before trial and renewed during the course of the trial.

3. The Lower Court erred in denying appellant's motion to inspect the Grand Jury minutes made before trial and renewed during trial.

4. The Lower Court erred in denying appellant's motion for judgment of acquittal made at the conclusion of the Government's case and renewed at the conclusion of the entire case.

5. The Lower Court erred in admitting into evidence three empty capsules not specified in the Indictment.

6. The Lower Court erred in admitting into evidence testimony from Patricia Ann Parks concerning transactions with the appellant alleged to have occurred, but not part of the Indictment.

7. The Lower Court erred in ruling that testimony of the appellant on the motion to suppress evidence would not be limited to the areas about which appellant would testify on direct examination.

8. The Lower Court erred in admitting into evidence statements allegedly made by appellant at the time of his arrest.

SUMMARY OF ARGUMENT

1. Appellant contends that the motion to suppress evidence of the capsules allegedly obtained from the apartment occupied by him at the timeof his arrest and upon which Counts Four and Five of the Indictment were predicated should have been granted and the evidence suppressed where the accompanying affidavit in support of the warrant was from a source whose reliability was neither alleged nor established and therefore was no probable case for the issuance of a search warrant for

premises 838 Chesapeake Street, S.E., Apt. 101, Washington, D. C.

2. Appellant contends that his motion to severance and grant separate trials on Counts One, Two and Three of the Indictment from Counts Four and Five of the Indictment should have been granted where it appears that the evidence and events of the First three counts of the Indictment are separate and distinct from Counts Four and Five and that therefore appellant was deprived of freedom of choice as to whether or not to take the witness stand and where he would be embarrassed and confounded in presenting his defense and the evidence of one could, in the mind of the jury, be corroborative of the other.

3. Appellant contends that he was entitled to the Grand Jury minutes of the witness Patricia Ann Parks who was the only witness to establish appellant's alleged connection with her. The viewing of the minutes by the Trial Judge en camera and his determination as to the lack of inconsistencies in testimony was insufficient to deny appellant the minutes. This is especially true where considerations of Grand Jury secrecy were minimal in view of the fact that Parks herself testified at the trial.

4. At the conclusion of the Government's case and the entire case appellant moved for judgment of acquittal which was denied. Appellant alleges error in view of the fact that the evidence on Counts, One, Two and Three consisted of the testimony of an addict and seller of narcotics and was uncorroborated and further that there was a violation of her constitutional rights in obtaining the affidavit in support of the

search warrant which tainted all other things which flowed from it. That as this evidence and testimony was used against appellant, appellant contends that he is in a position to avail himself of such violation and therefore the case must fall. Further, as to the last two counts of the indictment, the evidence was speculative and conjectural in view of the fact that there were three adults in the apartment at the time of the execution of the search warrant, but only appellant was charged. The jury would have to speculate as to whether appellant was in possession of the alleged narcotics as opposed to the other two persons.

5. The Trial Court admitted into evidence over objection, three empty capsules, allegedly found in the bedroom of the apartment where appellant was found. The evidence of the chemical analysis was excluded. This evidence was not part of the indictment. The only possible relevancy of this evidence was to show by circumstances that appellant was in possession of the alleged narcotics which comprise Counts Four and Five of the Indictment. Appellant submits that this was prejudical, especially in view of the fact that there was no evidence to show that these three capsules contained or did contain narcotics, and this being so, it could only have a prejudicial effect on the jury.

6. The Trial Court permitted, over objection, testimony from Paticia Ann Parks as to other alleged transactions with appellant not contained in the indictment. Such testimony could only have a

prejudicial effect on the jury and was irrelevant to the pending charges. The proffer of this evidence and its reception was not made in pursuit of certain recognized exceptions to the admission of other crimes of a similar nature and the evidence did not support its reception.

7. During the hearing out of the presence of the jury on the renewal of the motion to suppress, appellant desired to take the witness stand. Counsel wanted a ruling from the Court as to the limit of the cross-examination. No ruling was given which would have limited the cross-examination of appellant to the matters testified to on direct. In view of the fact that the proffer of testimony was only to be on one aspect of the motion to suppress and not on the entire merits of the case, appellant submits that the ruling of the Trial Court of error.

8. Appellant contends that the Trial Court erred in admitting into evidence the alleged statements of appellant to the police at the time the narcotics comprising Counts were allegedly seized at the apartment on Chesapeake Street. In view of the contended unlawful search and seizure as set forth in Point One, anything which flowed from the search and seizure would be inadmissable, including any alleged statements from the appellant.

ARGUMENT

Point One [1].

Appellant contends that there was error in the denial of the motion to suppress made prior to trial and renewed during the course of the trial.

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1. Tr. 123-134; 139-141

Appellant submits that it is significant that there was no arrest warrant obtained for appellant, but only a search warrant for the premises 838 Chesapeake Street, S.E., Apt. 101. The sole basis for the issuance of the warrant for the above-stated address was the supporting affidavit of Patricia Ann Parks. The information obtained from her was supported by nothing concerning her reliability as an informant. Her reliability was neither alleged nor established and therefore would not establish probable cause. Gatlin v. United States, 117 U.S. App. D.C. 123, 128, 326 F.2d 666.

The fact that in the Gatlin case, supra there was the absence of a warrant, while in the instant case there was a search warrant, is immaterial as the standards are the same, Ker v. California, 374 U.S. 23.

The affiant, Patricia Ann Parks, was arrested on a charge of Harrison Narcotic Act. At the time of her arrest and in her subsequent affidavit she identified appellant as the person from whom she received the narcotics found in her apartment. She supplied the address from which she said narcotics were received from appellant.

There is nothing in the record to indicate that Parks was previously known to the officers as an informant and as a person who had previously supplied reliable information. She was under arrest herself and narcotics were found in her possession. It was her bare assertion that she received narcotics at the Chesapeake Street address that was used to obtain the warrant for these premises. The other supporting

affidavit mentioned appellant, but set forth his alleged activities at locations other than the Chesapeake Street address. In fact that affidavit reveals a telephone number and listing of the occupant of the Chesapeake Street address as some person other than appellant.

By virtue of the fact that there was no experience for confidence in the reliability of Parks as an informant, the warrant for the search of the Chesapeake Street premises must fall. Wong Sun v. United States, 371 U.S. 471, 480.

Point Two 2.

Both prior to trial and before trial, appellant moved for severance. Appellant contends that it was error for the Court to deny the motion. As will be noted, the Indictment alleges two different transactions. The first three Counts concern the alleged sale to Patricia Ann Parks on March 23rd and the last two Counts concern the alleged possession of narcotics by appellant on March 25th.

It is obvious from a reading of the entire record that the evidence on each of the two alleged transactions was different. Furthermore, appellant contends that the evidence on the two was weak when taken separately, but putting both together it would appear that the evidence on one would tend to corroborate the other. Appellant further did not take the witness stand because of the ruling of the Court concerning the scope of possible cross-examination.

At the outset it should be stressed that with regard to Counts One through Three, the sole evidence connecting appellant with the alleged

Tr. 3-11; 276-277

sale of the narcotics came from the testimony of Patricia Ann Parks. Parks was an admitted user and seller of narcotics. She was herself a defendant on a charge of Harrison Narcotic Act, the same capsules which comprised the Counts of the Indictment against appellant. Admittedly, she implicated appellant and was permitted to plead guilty to a misdemeanor for her "cooperation" in the case against appellant. There was no evidence to corroborate her allegations. No other witness for the Government testified as to any connection between Parks and appellant. The case on its face was weak and the jury may very well have chosen to disbelieve her had no evidence been offered by appellant and had he been tried on those Counts alone.

On the other hand, Counts Four and Five did not involve Parks at all. She was not a witness to these charges and was not involved in them. At the time that the police searched the premises at the Chesapeake Street address, there were three adults found in the apartment. The six capsules were found in a living room ostensibly accessible to each one of the three. Appellant's alleged statement that he would have to think about them before he would admit that they were his was equivocal at best. The jury could very well chosen to believe that possession of the narcotics in appellant was not established to their satisfaction beyond a reasonable doubt.

However, putting both of the cases together during the course of a single trial could, in a very real and not a speculative sense, have caused the jury to feel that the weakness in the first three Counts of

the Indictment were cured by the evidence in the last two. In other words, one was corraborative of the other.

Such was the very evil that was recognized by this Court in Kidwell v. United States, 38 App. D.C. 566, corroboration where no corroboration exists. Each of the offenses in the instant case were separate and distinct classes of felonies, allegedly committed at different times, complete in themselves, independant of each other and provable by different evidence. As such, appellant contends, they were improperly joined in the same indictment. McElroy v. United States, 164 U.S. 76.

In the instant case, there was no similarity in the way the alleged offenses (Counts One through Three and Counts Four and Five) were committed. The only similarity is that all of the Counts were narcotic offenses. That is the evil of the joinder in this case. As such, it is highly probable that a jury could not dismiss from their minds that narcotics allegedly sold to Parks by appellant was corrorborated by the fact that narcotics were allegedly found in appellant's apartment. This was not a case of simple and distinct evidence relevant to each charge. Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85, Dunaway v. United States, 92 U.S. App. D.C. 299, 205 F.2d 23. The allegations concerning the obtaining of narcotics by Parks at the Chesapeake Street address and the allegedly discovery of narcotics at the same address are factors which cannot be erased.

Secondly, joinder was prejudicial because appellant's freedom of

choice as to whether or not to testify was denied him.

This was the decisive factor in Cross, et al v. United States, 118 U.S. App. D.C. 324, 335 F.2d 987, wherein this Court said:

> "Prejudice may develop when an accused wished to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each court: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. . ."

A decision not to testify as to Counts One, Two and Three would be reasonable and good strategy in view of the fact that the sole evidence rested on the uncorroborated testimony of an admitted user and seller of narcotics, who, herself was a defendant. As to Counts Four and Five, however, the evidence reflected three adults in the apartment at the time of the seizure and the testimony of Linnett Watts inferring that the narcotics may very well have been "planted" by the officers. Her testimony showed that one officer had searched the couch and found nothing, but a second officer revealed a glassine envelop allegedly containing six capsules. There would have been a real need for appellant to testify in such circumstances to corroborate his witness.

This freedom of choice was denied him. This situation puts defense counsel in a dilema for he cannot adequately advise his client to make an intelligent decision as to whether or not to take the stand, when in his own mind different factors are too weighed concerning each alleged

crime.

Therefore, appellant contends, his denial of severance was error.

Point Three 3.

By motion prior to trial, appellant asked for the minutes of the Grand Jury testimony of Patricia Ann Parks. This motion was renewed during the course of the trial. The minutes were transcribed and viewed in camera by the trial Judge. They were not made available to counsel.

In view of the fact that the sole witness as to Counts One through Three of the Indictment was Parks and in view of the fact that she was an admitted user and seller of narcotics and herself a defendant at one time involving the capsules specified in those Counts, a particularized need was shown for inspection by counsel of the Grand Jury minutes.

At the time of the trial in the instant case, Dennis v. United States, 384 U.S. 855, had not been decided and counsel was mindful of the case of the practice of en camera inspection by the trial Judge as to whether or not inconsistencies were revealed in the Grand Jury minutes, see Dennis v. United States, supra. at page 874.

In view of the Dennis decision, appellant submits that he was entitled to the Grand Jury testimony of Parks.

Point Four 4.

Appellant contends that a judgment of acquittal should have been granted in this case.

As to the first three Counts of the Indictment, the evidence rested solely on the testimony of Parks. Appellant contends that initially her

3. Tr. 73-74; 116-117; 236-239 / 4. Tr. 243-247; 293

Constitutional rights were violated and as a violation of those rights evidence was secured against the appellant. The question, therefore, is whether an accused can avail himself of the violation of the Constitutional rights of another.

Initially, when Parks was arrested, she implicated appellant and later subscribed to an affidavit which was used as the basis for a search warrant. After Parks appeared before the United States Commissioner, she was advised of her rights pursuant to Rule 5 of the Federal Rules of Criminal Procedure. She was without an attorney at the time. That very day, the same officer whose function it was to advise her of her rights to silence, counsel and preliminary hearing, took her affidavit which was in all effects a confession of the very crime of which she was charged.

Certainly, it cannot be said that Parks intelligently waived her Constitutional rights when she signed the affidavit. Under all of the circumstances it was not a knowing or intelligent waiver. Johnson v. Zerbst, 304 U.S. 458.

From the arrest of Parks, comes her implication of appellant, her appearance before the Commissioner, her affidavit subscribed before him without counsel. From there comes the search warrant and the arrest of appellant. Further, the disposition of Parks' Harrison Narcotic case by it being charged as a misdemeanor in the Court of General Sessions.

Clearly, appellant contends that Parks' constitutional rights were violated in the beginning. Everything else flowed from that violation.

This included the search of the Chesapeake Street address, the arrest of appellant, Parks' appearance before the Grand Jury and finally her testimony at trial. This issue is whether appellant can avail himself of it.

The issue has never been decided from appellant's counsel's research. The problem, however, was forseen in the case of United States v. Wolfe, (CA 7th Cir, 1962) 307 F.2d 798 wherein the Court recognized that a serious question could arise if evidence would be used in a Federal prosecution which had been obtained by proven coercion of a witness in violation of that witness' Constitutional rights. The Supreme Court of the United States in Turner v. Pennsylvania, 338 U.S. 62, recognized the possibility but did not pass upon it. The Matter has been treated in an excellent article in 57 Northwestern Law Review at page 549.

Appellant asks this Court to meet this issue squarely in this case. The facts are there. Had there been no affidavit from Parks, there is all likelihood that there would have been no search warrant, no arrest, no testimony and no trial. It all stemmed from obtaining an affidavit from an accused who did not have the benefit of counsel at the time it was made. Furthermore, it was subscribed by a judicial officer who only moments before had advised the affiant of her rights. She was without counsel. She was in no wise in a position to make an intelligent decision as to whether she should waive her right to remain silent even though she no doubt had been so advised. Her situation in this respect

was no doubt compounded by the fact that the United States Commissioner who advised her of her rights, subscribed to her confession.

Appellant submits that the whole tenor of the events from Parks' arrest, her interrogation at police headquarters where she was questioned, her appearance before the Commissioner and the obtaining of the affidavit all support a violation of the Constitutional rights of the witness. No doubt, if these matters had been contested, a conviction of Parks on this type of evidence could not stand. No less, should the conviction of appellant stand by the use of such evidence? Appellant contends that it should not.

As to Counts Four and Five, the conviction should not stand in view of the fact that the chain of events ran from the arrest and interrogation of Parks and therefore was tainted by the original illegality and was the "fruits of the poisonous tree." Wong Sun v. United States, supra.

Furthermore, the evidence against appellant was speculative on these two Counts as there were other persons in the apartment at the time who could just have easily had possession of the alleged narcotics. Appellant's equivocal statement to the police was also part and parcel of the unlawful search and seizure for the reasons set forth in Point One above.

Point Five [5]

Appellant submits that there was error in admitting into evidence testimony of the three capsules allegedly found in the bedroom at the

5. Tr. 117-121; 164-168; 220-221

time of the entry into the apartment on Chesapeake Street. Although the Court allowed testimony concerning the finding of the capsules, it ruled out testimony concerning their chemical analysis.

The principle of law is that evidence of one crime is not admissible to prove a disposition on the part of an accused to commit crime. Drew v. United States, supra.; Martin v. United States, 75 U.S. App. D.C. 399, 127 F.2d 865.

The Government contended that they were being used to connect the appellant with the six capsules and to show knowledge and intent. However, no connection was shown between the three capsules and the six capsules which are the subject of Counts Four and Five of the Indictment and in fact, the Court ruled out testimony concerning the chemical analysis of the traces in those three capsules.

In view of these factors no relevancy was shown, no element going to intent was shown and therefore the objection to the testimony should have been sustained.

Point Six [6]

During the re-direct examination of Parks, the Government was permitted, over objection, to inquire of Parks concerning transactions allegedly made with appellant at times other than those specified in Counts One through Three of the Indictment. The theory was that during cross-examination, appellant's counsel by asking Parks about her sources of income during March 1965 and persons with whom she had dealt in narcotics, this avenue was opened up. Of course, during the cross-

6. Tr. 45-75; 92-105

examination, Parks never referred to appellant as the person with whom she dealt and as being a source of income.

This being the case, what the Court did, by allowing such redirect examination, was to establish evidence of crimes other than those for which appellant was charged. It is submitted that this was error. There was no proffer in this regard to show motive, intent, absence of mistake or accident, common scheme or plan or identity. Drew v. United States, supra.

The sole effect of such testimony would raise of presumption of prejudice and therefore, error was committed, highly prejudicial in nature. Drew v. United States, supra.

Point Seven [7]

Appellant contends that he should have been permitted to testify on the motion to suppress evidence, out of the presence of the jury, without fear of cross-examination as to impeachment and areas outside the scope of the direct examination.

That is the purpose of permitting a defendant to testify out of the jury's presence. Pyles v. United States, CADC 6-2-66, No. 19,709, page 6 slip opinion, note 2. Also Jackson v. Denno, 378 U.S. 368.

The crucial issue on the motion to suppress, aside from the probable cause aspect as discussed in Point One, above, is whether the officers complied with the requirements of Title 18, U.S.C. 3109 and mandate of Miller v. United States, 357 U.S. 301.

The Trial Court had only one side of the story upon which to base

7. Tr. 134-139

its decision. Appellant feels that he was entitled to present his side unfettered by cross-examination on collateral matters.

Point Eight [8]

Appellant finally contends that it was error to admit his alleged statements at the time of the search of the Chesapeake Street premises. The argument on this point refers to Point One where the legality of the search and seizure was challenged. Necessarily, if the search was illegal, all that flowed from it would be illegal, including any statements allegedly made by appellant.

CONCLUSION

In view of all of the premises considered, appellant prays that the judgment of the Court below be reversed.

Respectfully submitted,

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Counsel for Appellant

8. Tr. 122-123; 167, 171

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,177

LEONARD P. BLACKWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

Cr. No. 799-65

QUESTIONS PRESENTED

1. Was the evidence sufficient to support appellant's convictions

a) as to counts One, Two and Three: where his accomplice testified that she picked up narcotics from his apartment and a chemical analysis of the capsules showed them to contain heroin; and

b) as to counts Four and Five: where capsules containing heroin were recovered from his living room couch, he said he "would have to think about it" before admitting they were his, and three capsules with traces of white powder were recovered from his bedroom, which he shared with his wife, one being found about a foot from where he had slept?

2. Was the confession-affidavit of an accomplice, executed before a United States Commissioner, which admitted daily narcotics pick-ups from appellant's apartment ending two days earlier, sufficient to support a search warrant, executed in the daytime, which was otherwise supported by a police affidavit reflecting that five previously reliable informants had reported appellant dealing in narcotics and several officers had seen appellant on the public streets in the company of known narcotics users?

3. Should this Court apply retroactively *Dennis* v. *United States,* a non-constitutional decision, when the opinion of the Supreme Court does not so require? If so, does retrospective application require reversal where the trial judge, *in camera,* examined for inconsistencies the requested grand jury testimony of a single witness and denied production?

4. Where there was proper joinder of offenses, did the trial court abuse its discretion in not granting a severance when the offenses wer similar and were committed only two and a half days apart, the testimony

evinced a scheme to distribute narcotics, the government witnesses would have been the same in each trial, and, assuming appellant took the stand as he offered to do for the limited purpose of testifying on the first three counts, his defense of non-possession would have made cross-examination on all counts relevant.

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

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---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Under a five count indictment filed July 19, 1965 appellant was tried on March 15, 16, and 17, 1966 before the Honorable Joseph C. McGarraghy and a jury for selling narcotic drugs (26 U.S.C. 4705(a); one count), possession of narcotic drugs (26 U.S.C. 4704(a); two counts), and facilitating the concealment and sale of narcotic drugs (21 U.S.C. 174; two counts). He was convicted on all five counts and received 7 year prison terms for each of the selling and facilitation counts and 1-3 year prison terms for the possession counts, all sentences to run concurrently. He now appeals through his trial counsel.

The trial testimony may conveniently be separated into two categories, the first relating to counts One, Two and Three of the indictment which spring out of the events of March 22 and 23, 1965 and the second category relating to the Fourth and Fifth counts which are founded upon the events of March 25, 1965.[1]

a. The Events of March 22-23.

Acting pursuant to a search warrant, Detective David Paul and four other members of the Narcotics Squad of the Metropolitan Police Department, at about 4:20 p.m. on the afternoon of March 23, entered the apartment of Miss Patricia Ann Parks after she opened the door in response to their knock and after announcement of their authority and purpose (Tr. 146-48). Almost immediately the officers found their quarry, a cache of 29 capsules which an expert chemist later identified as being part "heroin hydrochloride, a derivative of opium, a narcotic drug" (Tr. 148-49, 226). There were no tax stamps on the capsules (Tr. 156-57). Also recovered was an address book containing appellant's name, address and telephone number (Tr. 58, 101-02).

Miss Parks testified that the seized narcotics were part of an allotment of 50 capsules which she had procured the previous evening from appellant at his apartment after arranging the delivery rendezvous by phone in the afternoon (Tr. 21, 27-35, 37-40). The ten minute transaction was accomplished in appellant's bedroom with no one else present (Tr. 31, 33, 35). She remitted to appellant $70 which represented partial proceeds from the previous sale

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[1] Appellant's pretrial motions 1) to suppress all evidence seized as a result of the search of his apartment; 2) to inspect grand jury minutes of the testimony of Patricia Ann Parks; and 3) for severance of counts One, Two and Three from counts Four and Five of the indictment were denied by the Honorable William B. Bryant after a full hearing and are, *inter alia*, the subject of this appeal. Motions for dismissal of counts One, Two and Three for lack of a speedy trial and for a pretrial hearing of government witnesses were also denied by Judge Bryant, but these rulings are not questioned.

of "capsules of heroin", and he in turn replenished her inventory (Tr. 31-3). Appellant told her to sell each capsule for $2.50, but there was little other conversation about selling the capsules because she knew "what was to be done with it" (Tr. 33-4). She saw no revenue stamps on the narcotics and gave appellant no written treasury department order form (Tr. 35-6).[2]

Appellant, who did not testify at trial, offered no evidence in defense of counts One, Two and Three. Instead he sought to attack the credibility of Miss Parks who with unusual candor admitted that at the time of her arrest she was taking narcotics and, in addition to her legitimate work, "was doing a little bit of hustling [prostituting]" (Tr. 49-50). Having admitted that she had already served her 120 day jail sentence for possessing the 29 capsules of narcotics, she stated that her testimony was "the truth", that the affidavit she signed "was correct", and that no one threatened her to obtain her testimony (Tr. 42, 105, 110, 112).

b. The Events of March 25.

On March 25 Detective Paul and the same team of four narcotics squad officers executed a search warrant at approximately 7:30 a.m. at appellant's apartment (Tr. 158-59). Inside were appellant, his wife Electra, three children and a woman who identified herself as "Mrs. Young . . . Blackwell's sister" (Tr. 172), but testified at trial for appellant as Linnett Watts and denied giving that name to the officers (Tr. 162, 164, 248, 260-61). Detective Paul's first knock went unanswered, although some move-

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[2] Miss Parks was placed under arrest for violation of the Harrison Narcotics Act, a felony (Tr. 155). Immediately after her arraignment, at which she recalled being told that she did not have to make any statement, she executed an affidavit before the United States Commissioner in which she admitted possession of the capsules and identified appellant as her source (Tr. 58-62). Less than a month later she plead guilty to a misdemeanor charge under the Uniform Narcotic Drug Act and was sentenced to jail for 120 days (Tr. 42, 180-81).

ment could be heard in the apartment (Tr. 127). A few seconds later, prompted by a call from the officer deployed outside the front window of the apartment stating that he was being watched through the venetian blinds, Detective Paul "banged again" (Tr. 127). The second knock was accompanied by an announcement of authority and purpose (Tr. 127). A minute passed. Still no response. Then Detective Paul entered with a pass key procured from the janitor to obviate the necessity of a forceful entry under just these circumstances (Tr. 126-27).

Detective Paul proceeded immediately to appellant's bedroom, where Miss Parks had reported being given the fifty capsules (Tr. 31, 128). Here he recovered three capsules containing traces of white powder, all of which were lying, unhidden, about the bedroom (Tr. 166). When asked about the capsules, according to Detective Paul, appellant replied that "before he said the capsules were his, he would have to think about it" (Tr. 167). He made the same statement when asked about six full capsules, later identified as containing heroin hydrochloride, recovered from his couch in the living room after an hour's search (Tr. 168-69, 171, 230-31). There were no Internal Revenue tax stamps affixed to any of the capsules (Tr. 168, 172).

Officer Robert I. Bush corroborated the important particulars of Detective Paul's testimony relating to the seizure of the narcotic capsules in appellant's apartment (Tr. 195-203).

Appellant's defense on counts Four and Five rested mainly on the testimony of Linnett Watts who implied that the police officers "planted" the narcotics recovered from the couch (Tr. 250-53).[3]

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[3] Judge McGarraghy interrupted the trial to take testimony on appellant's reiterated motion to suppress (Tr. 125). After the testimony of Detective Paul, defense counsel expressed his wish to put appellant on the stand "for the purpose of this motion only" (Tr. 134), and made the extraordinary contention that his client's examination "should be limited solely to my direct examination" (Tr. 135). The court properly rejected the idea of a one-sided

STATUTES AND RULES INVOLVED

Title 21, United States Code, Section 174, provides in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

Title 26, United States Code, Section 4704(a), provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima

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examination, ruling that generally the scope of the direct examination and the credibility of the witness were proper subjects of cross-examination and beyond that he would not give advisory opinions but would pass on the questions that were actually asked (Tr. 135-37). Trial counsel responded, notwithstanding the court's assurance that none of the testimony taken at the hearing could be used before the jury, "in view of the Court's ruling on this matter, this defendant does not desire to take the stand" (Tr. 137). After the court pressed counsel on his unusual stand and counsel altered his position to limiting "cross-examination to direct examination" and impeachment by prior conviction, counsel stated simply that "the defendant indicates that he would not choose to take the stand" (Tr. 139).

At the close of the defense, counsel proffered that appellant would be willing to testify "as to the fourth and fifth counts but not as to Counts 1, 2, and 3" (Tr. 276). Without elaboration the court sustained the government's objection to such a limitation (Tr. 276). Appellant did not testify and his wife evidentally refused to testify on his behalf (Tr. 276).

facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, United States Code, Section 4705(a), provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Rule 8(a) of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14 of the Federal Rules of Criminal Procedure provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

SUMMARY OF ARGUMENT

I

The evidence was sufficient to sustain the jury's verdict of guilty on all counts. The conviction on Counts One, Two and Three was amply sustained by the testimony of appellant's accomplice, Miss Parks, that she picked up from him, on consignment, a lot of fifty capsules. Corroboration may be found in the chemical analysis of some

of these capsules revealing the presence of heroin and in Miss Parks' underlying circumstances which show that her own narcotic "habit" could be conveniently fed and satisfied by her activities as a "pusher." The record does not confirm that any of her rights were violated when she confessed at arraignment, and even if they were her reiteration of the confession at trial cured any alleged infringement. Furthermore, appellant has no standing to cloak himself with this alleged infirmity. On the remaining counts, the recovery of the drugs from appellant's living room, his quasi-admission that he "would have to think about it" before acknowledging the capsules to be his, and the recovery of capsules with traces of white powder in his bedroom, one adjacent to his side of the bed, make his guilt a proper question for the jury.

II

The eyewitness testimony of an accomplice, expressed in an affidavit sworn to before a United States Commissioner, alleging the daily presence of narcotics in appellant's apartment for about a month ending two days earlier, is sufficient to establish probable cause for the issuance of a search warrant which was executed in the daytime. An additional affidavit, revealing police department knowledge gathered through five previously reliable informants that appellant was dealing in narcotics and detailing the observations of several officers who noted appellant on the public streets in the company of known narcotics law violators, provides more than a substantial basis for concluding that narcotics were probably present. The police in this case did exactly what the Constitution requires.

III

The trial court, *in camera*, inspected the grand jury testimony of Miss Parks for inconsistencies and denied the request for production, without drawing an objection. Under the circumstances of this case the recent Supreme Court decision of *Dennis* v. *United States*, even if considered applicable would not require overturning appel-

lant's conviction. That non-constitutional decision, however, should not be applied retrospectively, particularly in light of the failure of the Supreme Court itself to do so and its reluctance to so apply recent important constitutional decisions.

IV

The similarity of the offenses, their proximity in time, their inter-relationship which demonstrate a scheme to distribute narcotics, and the identity of government witnesses in both cases, compel the conclusion that joinder of counts was appropriate, if not required. The trial court properly ruled, when appellant offered to take the stand, that he could not limit his testimony to corroboration of his defense to Counts One, Two and Three, proffered through Miss Watts, that the officers "planted" the capsules seized from his apartment. Particularly because he made possession a vital issue, the transaction in which he gave Miss Parks 50 narcotic capsules in his bedroom two and a half days earlier, even though this was the subject of the remaining counts, was highly relevant and admissible on Counts One, Two and Three. Appellant suffered no prejudice due to joinder and his trial tactic not to testify must stand. There was no abuse of discretion in refusing to sever.

ARGUMENT

I. The evidence was sufficient to uphold appellant's conviction on all counts of the indictment.

(Tr. 32, 45-6, 55, 58, 101-02, 110, 112, 134-35, 137-38, 159, 166-67, 171, 220, 291)

Appellant's three-pronged attack on the sufficiency of the evidence supporting his conviction is firmly rebutted by existing case law and the record.

First, as to Counts One, Two and Three, appellant seems to contend that a narcotic conviction cannot be up-

held on the testimony of a single witness. This Court has recently reaffirmed the contrary. *(Alvin T.) Morrison* v. *United States,* —— U.S. App. D.C. ——, 365 F.2d 521, 523 (1966). But the record corroborates Miss Parks' confession that she sold narcotics for appellant and that she procured the seized 29 capsules from him: 1) she possessed an unusually large number of capsules for a mere user; 2) a set of the "works" (a cooker, needle and syringe capable of administering narcotics) was recovered from her apartment (Tr. 55), and when combined with her admitted use of narcotics (Tr. 45-6) suggests a need for facilely obtaining drugs and paying for them, which could be accomplished through selling; and 3) the recovery of an address book containing appellant's name, address and telephone number (Tr. 58, 101-02).

Second, appellant asserts, as to all counts, that Miss Parks' confession, embodied in a sworn affidavit and made before a United States Commissioner after being fully informed of her rights, was invalid because she confessed out of the presence of an attorney, and thus she cannot be said to have intelligently waived her right to remain silent. Hence all counts, he urges, are fatally tainted. To appellee's knowledge, no court has held that a confession is invalid because it was made out of the presence of an attorney. See *Long* v. *United States,* 119 U.S. App. D.C. 209, 338 F.2d 549 (1964). Under the instant facts the waiver of her right to remain silent was hedged about with ample safeguards to ensure its validity. Furthermore, she fully reaffirmed it at trial after being advised by an attorney (Tr. 16, 110), and stated that no one threatened her to obtain her testimony (Tr. 112).

Moreover, appellant has no standing to object to any alleged deprivation of Miss Parks' constitutional rights. See *Jones* v. *United States,* 362 U.S. 257, 261 (1960) ("In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only by use of evidence gathered as a consequence of a

search or seizure directed at someone else"); *accord*, *United States* v. *Grosso*, 358 F.2d 154 (2nd Cir. 1966), *cert. granted on other grounds*, 87 S. Ct. (1966); *Bowman* v. *United States*, 350 F.2d 913, 915-16 (9th Cir. 1965) and cases cited therein (defendant has no right to assert the Fifth Amendment on behalf of a witness or to complain of an erroneous ruling as to a witness).

Third, as to counts Four and Five there was sufficient evidence for the jury to find that appellant possessed the narcotic capsules found in the apartment couch.[4] The fact that he lived in the apartment, that when asked if the capsules were his he stated "before I say they are mine, I will have to think about it", (Tr. 171), whereas appellant's wife and houseguest both immediately denied knowledge of the capsules (Tr. 167, 291), and that traces of capsules were recovered from his bedroom, one having been found about a foot from where he had been lying in bed (Tr. 166),[5] remove any need for jury speculation.

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[4] Only constructive possession need be shown. See *Jackson* v. *United States*, 94 U.S. App. D.C. 71, 214 F.2d 240, *cert. denied*, 347 U.S. 1021 (1954); *Robinson* v. *United States*, 53 App. D.C. 96, 288 Fed. 450 (1923) (drugs found outside appellant's house under a strip of weather boarding tended to prove possession).

[5] The trial judge correctly admitted the testimony of Detective Paul that immediately upon entering appellant's apartment he proceeded to appellant's bedroom (Tr. 159) where he found three capsules "containing small quantities of a white powder" (Tr. 166). The capsules were all in the open, one being recovered from the bed rail about a foot from where appellant had been lying, one from the dresser and one from the floor (Tr. 166). There was a capsule top next to the capsule on the dresser (Tr. 166). When asked about these traces capsules, appellant stated (as noted above) according to Detective Paul, "before he said the capsules were his, he would have to think about it" (Tr. 167). Appellant's wife, on the other hand, denied having knowledge about them at all (Tr. 167). The recovery of these traces capsules was, beyond cavil, probative in establishing appellant's possession of the glassine envelope that "contained six capsules of a white powder" recovered from the living room couch even though the trial judge ruled that the analysis of their contents, proffered to be heroin, was not relevant (Tr. 220). The three traces capsules could also have been included in the indictment, not as separate crimes but as additional evidence of the crimes charged in Counts Four and Five. The recovery of the six full capsules, however, rendered this superfluous. The trial judge correctly admitted this testimony.

In addition, the jury could properly consider Miss Parks' testimony concerning her continued pick-ups of narcotics from appellant, which ended just two and a half days before the search of appellant's apartment, as bearing on his knowledge and on absence of mistake (Tr. 32). Accordingly, the motion for judgment of acquittal was properly denied.[6]

II. The affidavits were sufficient to support the issuance of a search warrant for appellant's apartment.

(Tr. 140-41)

Two judges below have upheld the validity of the search warrant for appellant's apartment (Tr. 140-41). The warrant is now again challenged on the limited ground that the affidavits of Miss Parks and Detective Paul were insufficient to support its issuance, principally because the affidavit of Miss Parks "was supported by nothing concerning her reliability as an informant" (Br. p. 10).

The argument is based on an erroneous assumption and must fail. Miss Parks was not a government informant,

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[6] At trial, during the motion to suppress held out of the presence of the jury, trial counsel contended that appellant should be allowed to testify on the limited subject of the execution of the warrant without being cross-examined (Tr. 134-35). This contention violently clashes with the time honored principle that a trial is an adversary process, and the court properly ruled that cross-examination could include "the same area" as the direct examination and "any other matters which are of an impeaching nature, that will affect his credibility" (Tr. 137). The court later added that it would pass on the specific questions when they were asked (Tr. 138). Nevertheless, appellant declined to take the stand (and did not offer his wife or Miss Watts) despite the assurance of the judge that the testimony given in the hearing could not be used before the jury (Tr. 137), which is the proper interpretation of the language in *Pyles* v. *United States*, D.C. Cir. No. 19,709, slip op. at 6, fn 2, decided June 2, 1966. The fact-finder, whether at trial or at a hearing, should be aided by proper challenges to credibility, whether in the form of impeachment by prior conviction, by prior inconsistent statements or by testimony of other witnesses. Not to allow impeachment of appellant would have branded the hearing with lopsided unfairness.

paid or otherwise; she was an accomplice of appellant, as the Court properly instructed the jury it could find (Tr. 300-01), and her affidavit was in fact a confession. Thus this is not the case of a "faceless informer" providing hearsay information, and the requirement of proven reliability does not exist. Cf. *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Jones* v. *United States*, *supra*.

What better probable cause could there be than the sworn assertion of one who had daily picked up narcotics in 50 capsule lots from appellant's apartment? Since the affidavit is a confession which provided damaging proof of Miss Park's own involvement in more than mere possession of narcotics, there is little chance that the affidavit is a "reckless or prevaricating tale." *Jones* v. *United States*, *supra* at 211. Also, the quantity of capsules recovered from Miss Parks' apartment, the preliminary field test showing them to contain narcotics, and Miss Parks' admission to being a "pusher" demonstrate vital underlying circumstances crediting the affidavit.

If corroboration of Miss Parks' affidavit is necessary, which appellee contends it is not, such corroboration is adequately supplied by the affidavit of Detective Paul, which documents the police department's knowledge that appellant was trafficking in narcotics: 1) five previously reliable sources reported him selling heroin; 2) an additional source reported him selling heroin; and 3) five officers reported seeing appellant on the public streets in the company of known narcotic users.[7]

This plethora of information warrants "a man of reasonable caution in the belief that an offense is being committed." *Ker* v. *California*, 374 U.S. 23 (1963). And if there be any uncertainty the Supreme Court has directed that the resolution of doubtful or marginal claims of whether affidavits establish probable cause should be re-

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[7] Observations of fellow officers are plainly a reliable basis for a warrant. *United States* v. *Ventresca*, *supra* at 111.

solved in favor of the warrant. *United States* v. *Ventresca, supra* at 109.[8]

III. The trial court's *in camera* inspection of grand jury minutes was in accordance with established law; no plain error resulted and no compelling reasons are shown for applying retroactively the subsequently announced rule in *Dennis* v. *United States*.

(Tr. 77)

At trial appellant requested that the grand jury testimony of Miss Parks "should first be examined in camera by the Court to determine whether or not there are any inconsistencies" (Tr. 77). The court granted this request but later refused production of the minutes "on the basis of its in camera examination" (See Docket entry for March 17, 1965). Appellant concedes that the trial judge validly exercised his discretion in accordance with existing law (Br. p. 15), but seeks retrospective application of a rule subsequently announced in *Dennis* v. *United States*, 384 U.S. 855 (June 20, 1966) which would allow examination of grand jury minutes by a defendant if a particularized need is shown.

Assuming, *arguendo*, that appellant established a particularized need in the instant case, there are no compelling reasons for applying the *Dennis* decision retroactively and appellant suggests none. Furthermore, his complaint is not of such magnitude as to fall within the plain error rule of Fed. R. Crim. P. 52(b), for it appears "that the doors that may lead to truth have been unlocked." *Dennis* v. *United States, supra* at 873.

The *Dennis* rule is not of constitutional dimensions, but rather it governs an evidentary question which comes within the supervisory power of the courts to control.[9]

[8] Appellee concurs with appellant's assertion (Br. p. 21) that if the search warrant for appellant's apartment is invalid, the statements made by appellant during the course of that search are tainted so as to render them inadmissible. For the reasons stated above, however, appellee contends that the search warrant is valid.

[9] See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332, 341 (1943).

The Supreme Court has recently refused to apply important constitutional decisions retroactively.[10] *A fortiori*, a non-constitutional decision, which the court itself did not state was to be applied retroactively and which does not affect "the very integrity of the fact-finding process" [11] or avert "the clear danger of convicting the innocent" [12] should be governed by the "from this day forward" [13] rule.

IV. There was no abuse of discretion by the trial judge in refusing to sever Counts One, Two and Three from Counts Four and Five of the indictment.

(Tr. 23, 25, 31-32, 34, 46, 48-9, 83-6, 251-53, 276)

Appellant implicitly concedes that the counts in his indictment were properly joined. The similar character of the offenses, the common scheme of appellant traceable to the separate events of March 22 and March 25, the close proximity in dates, and the necessity for the same government witnesses in both cases, overwhelmingly support the joinder as proper under Fed. R. Crim. P. 8(a). Ap-

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[10] See, *e.g.*, *Johnson & Cassidy* v. *New Jersey*, 384 U.S. 719 (1966) (refusal to apply retroactively *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964)); *Tehan* v. *Shott*, 382 U.S. 406 (1966) (applying prospectively the rule forbidding adverse comment by judges and prosecutors on failure of defendant to testify); *Linkletter* v. *Walker*, 381 U.S. 618 (1965) (applying prospectively the rule excluding from state proceedings evidence obtained through an unreasonable search and seizure). Cf. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (retrospective application of right of an indigent to advice of counsel at trial); *Jackson* v. *Denno*, 378 U.S. 368 (1964) (retroactive application of right of an accused to effective exclusion of an involuntary confession from trial).

[11] *Linkletter* v. *Walker*, *supra* at 639.

[12] *Tehan* v. *Shott*, *supra* at 416.

[13] *(James S.) Coleman* v. *United States*, D.C. Cir. No. 19,662, decided July 14, 1966, slip op. at 7; see *Dooling* v. *Overholser*, 100 U.S. App. D.C. 247, 251, 243 F.2d 825, 829 (1957) and cases cited therein (statutory interpretation requiring representation by attorney or guardian before Mental Health Commission given prospective application only).

pellant contends, however, that it was an abuse of discretion not to sever the counts according to his request made pursuant to Fed. R. Crim. P. 14.

Appellant's claimed prejudice does not withstand scrutiny. First the evidence was not separate and distinct, because Miss Parks' testimony that she received a lot of fifty narcotics capsules two and a half days before the seizure from appellant's apartment and that she gave him $70 from the sale of other narcotics at a time when no one else was in his apartment, was directly relevant to the element of appellant's possession of the narcotics seized from his apartment. Hence the most important testimony on Counts One, Two and Three was admissible in the government's case in chief on Counts Four and Five.[14]

Assuming that in a separate trial appellant would have taken the stand as to Counts Four and Five (an assumption which is not clearly valid in light of appellant's refusal to take the stand at the motion to suppress where the court guaranteed him insulation from the use of the motions testimony before the jury) he could properly have been questioned about his specific transaction with Miss Parks two and a half days before in order to show knowledge and absence of mistake. This is particularly true since appellant constructed his defense as to Counts Four and Five around a denial of possession. There was no proffer of the specific testimony to be given, and it may have been only cumulative with the "planted" capsule defense already articulated through Miss Watts (Tr. 251-53, 276). In fact appellant suggests in his brief that corroboration would have been the limited purpose of his testimony (Br. p. 14).

The instant indictment, involving a non-capital offense, contains similar related offenses which were properly joined. See *Cupo* v. *United States*, D.C. Cir. No. 19,140,

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[14] *Cf. Cross* v. *United States*, 118 U.S.App.D.C. 324, 335 F.2d 987 (1964) (severance required where offenses are "clearly distinct in time, place and evidence"); see also *Gregory* v. *United States*, D.C. Cir. No. 19,599 decided July 28, 1966; *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

decided March 21, 1966. The possibility that the jury may confuse the evidence does not exist in the instant case where the evidence to support each count is short and simple. *Maurer* v. *United States*, 95 U.S. App. D.C. 389, 222 F.2d 414 (1955). This Court has previously upheld the joinder of multiple narcotics counts arising out of three different dates. *Robinson* v. *United States*, *supra*.[15] The joinder was clearly valid and there was no abuse of discretion in not granting a severance.[16]

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[15] See also *Monroe* v. *United States*, 98 U.S. App. D.C. 228, 234 F.2d 49, *cert. denied*, 352 U.S. 872 (1956) (18 specific crimes validly joined in trial of multiple defendants); *Dunaway* v. *United States*, 92 U.S. App. D.C. 299, 205 F.2d 23 (1953) (five counts of housebreaking and larceny arising out of three break-ins); *Smith* v. *United States*, 86 U.S. App. D.C. 195, 180 F.2d 775 (1950) (multiple counts charging receipt of money for two different females to engage in prostitution).

[16] On direct examination Miss Parks testified, without objection, to various facts, admissible to show either *res gestae*, identity, or the elements of the crime of selling narcotics, which clearly showed the jury that she had had a continuing narcotics dealership with appellant for some time prior to her arrest. For example, she had seen appellant from time to time at his apartment (Tr. 23); she had spoken to appellant on the phone on occasions prior to her calling to arrange the pick-up which resulted in the seizure from her apartment, and could recognize his voice (Tr. 25); at the time of the fateful pick-up she handed appellant $70 in cash which represented the proceeds from previous sales of "capsules of heroin" (Tr. 31); appellant took the money and "gave me some *more* capsules . . . some *more* heroin" (emphasis supplied) (Tr. 32); and appellant did not tell her what was to be done with the capsules because she knew "what to be done with it" (Tr. 34).

On cross-examination trial counsel seriously probed Miss Parks' source of income during the period prior to her arrest, intimating that she was a financial parasite on her roommate and that what money she did earn came primarily from prostituting (Tr. 48-9). Counsel also expanded Miss Parks' testimony on her prior dealings in narcotics, eliciting that she had sold narcotics on the street (Tr. 46), that she had on at least one occasion sold a lot of fifty capsules (Tr. 46), and that she daily supplied narcotics to a man identified only as "brother" (Tr. 83-6). Having himself opened the door to testimony concerning Miss Parks' means of support as a way of discrediting her, appellant should not be heard to complain that the government brought out all the facts. In any event, except, perhaps, for the dotting of an "i" and the crossing of a "t" the jury learned nothing from this re-direct examination that it did not already know. The matter is thus *de minimus*.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEONARD P. BLACKWELL,

Appellant

v.

No. 20,177

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING EN BANC

Comes now the appellant, Leonard P. Blackwell, by and through his attorney, and petitions the Honorable Court for a rehearing en banc, from the action of a panel of three Judges of this Court, affirming by judgment, without opinion, the conviction in the Court below on January 13, 1967.

It appeared that officers of the Narcotic Squad of the Metropolitan Police Department in executing a search warrant for premises 709 Massachusetts Avenue, N.E., Apt. 5, Washington, D.C. seized twenty-nine (29) of alleged heroin and arrested one Patrician Ann Parks charging her with violation of the Harrison Narcotic Act. Parks later swore to an affidavit before the United States Commissioner to the effect that she had received the capsules from appellant. She had no attorney at the time. On the basis of that affidavit and one of an officer of the Narcotic Squad, a warrant was obtained to search premises 838 Chesapeake Street, S.E., Washington, D.C., Apt. 101.

On March 25, 1965, armed with the search warrant, the officers went to the premises of 838 Chesapeake Street, S.E., obtained a key to the apartment 101 from the janitor and the officers testified that after knocking and identifying themselves, and receiving no response, they let themselves into the apartment. The officers found appellant and his wife in one of the bedrooms and another adult and some children in another bedroom. They also testified, over objection, as to finding two or three empty capsules in the bedroom where appellant was. They also claimed that they found six capsules in a couch in the living room of the apartment. They testified that appellant was asked about the capsules and over objection they were permitted to testify that appellant replied that before he would admit they were his he would have to think about it. Appellant was charged with the possession of these capsules.

During the course of the trial when the motion to suppress evidence was renewed, appellant desired to take the stand out of the presence of the jury to testify concerning the officer's entry into the apartment. Receiving no satisfactory assurance that his cross-examination would be limited to the issue of the execution of the search warrant, appellant did not testify.

Also appellant wanted to testify on the last Two Counts of the indictment, which concerned the six capsules allegedly found in the apartment. There was no assurance that his cross-examination would be limited to the issue involved (namely Counts Four and Five). Therefore, appellant did not testify.

The sole witness to Counts One, Two and Three (excluding the chemist and the officers) implicating appellant with the sale of narcotics to Parks was the witness Patricia Ann Parks. It was brought out that the Harrison Act charge was eventually dismissed before the U.S. Commissioner and she was permitted to plead guilty to a misdemeanor in the District of Columbia Court of General Sessions. Parks admitted drug addiction. Parks' testimony was that appellant had given narcotics to her to sell and the money obtained was to be divided in some fashion. There was no corroboration as to Parks' testimony.

The sole witness for the defense, was one Linett Watts, who testified that she was in one of the bedrooms at the Chesapeake Street address when the officers came in. She testified that while she was in the living room one of the officers searched the couch (where capsules were allegedly found) and found nothing. Later, when appellant and she left the living room she stood in a hallway and observed one of the officers go to the couch and state that capsules had been found. One of the other officers stated that six had been found although the witness inferred that he could not see the capsules. She indicated that the capsules were in the palm of the hand of Officer Paul.

The appellant did not testify in view of the ruling of the Court concerning the scope of his cross-examination if he so testified.

Motions for judgment of acquittal were made at the close of the Government's case and at the close of all of the evidence and these motions were denied. After instruction, the jury convicted the appell-

ant of all counts of the indictment and he was sentenced to a total of seven years. It also should be pointed out that pre-trial motions for severance were made and denied and the basis of the motions was the fact that Counts One, Two and Three of the indictment were unrelated to Counts Four and Five, being separate and distinct, not provable by the same evidence and appellant elected not to take the stand because he desired to testify as to Counts Four and Five but not as to Counts One, Two and Three. There being no assurance that his cross-examination would be limited to the last two counts he did not testify.

ARGUMENT

1. Appellant contends that the motion to suppress evidence of the capsules allegedly obtained from the apartment occupied by him at the time of his arrest and upon which Counts Four and Five of the Indictment were predicated should have been granted and the evidence suppressed where the accompanying affidavit in support of the warrant was from a source whose reliability was neither alleged nor established and therefore was no probable case for the issuance of a search warrant for premises 838 Chesapeake Street, S.E., Apt. 101, Washington, D. C.

2. Appellant contends that his motion to sever and grant separate trials on Counts One, Two and Three of the Indictment from Counts Four and Five of the Indictment should have been granted where it appears that the evidence and events of the First three counts of the Indictment are separate and distinct from Counts Four and Five and that therefore appellant was deprived of freedom of choice as to whether

or not to take the witness stand and where he would be embarrassed and confounded in presenting his defense and the evidence of one could, in the mind of the jury, be corroborative of the other.

3. Appellant contends that he was entitled to the Grand Jury minutes of the witness Patricia Ann Parks who was the only witness to establish appellant's alleged connection with her. The viewing of the minutes by the Trial Judge en camera and his determination as to the lack of inconsistencies in testimony was insufficient to deny appellant the minutes. This is especially true where considerations of Grand Jury secrecy were minimal in view of the fact that Parks herself testified at the trial.

4. At the conclusion of the Government's case and the entire case appellant moved for judgment of acquittal which was denied. Appellant alleges error in view of the fact that the evidence on Counts, One, Two and Three consisted of the testimony of an addict and seller of narcotics and was uncorroborated and further that there was a violation of her constitutional rights in obtaining the affidavit in support of the search warrant which tainted all other things which flowed from it. That as this evidence and testimony was used against appellant, appellant contends that he is in a position to avail himself of such violation and therefore the case must fall. Further, as to the last two counts of the indictment, the evidence was speculative and conjectural in view of the fact that there were three adults in the apartment at the time of the execution of the search warrant, but only appellant was charged.

The jury would have to speculate as to whether appellant was in possession of the alleged narcotics as opposed to the other two persons.

5. The Trial Court admitted into evidence over objections, three empty capsules, allegedly found in the bedroom of the apartment where appellant was found. The evidence of the chemical analysis was excluded. This evidence was not part of the indictment. The only possible relevancy of this evidence was to show by circumstances that appellant was in possession of the alleged narcotics which comprise Counts Four and Five of the Indictment. Appellant submits that this was prejudical, especially in view of the fact that there was no evidence to show that these three capsules contained or did contain narcotics, and this being so, it could only have a prejudicial effect on the jury.

6. The Trial Court permitted, over objection, testimony from Patricia Ann Parks as to other alleged transactions with appellant not contained in the indictment. Such testimony could only have a prejudicial effect on the jury and was irrelevant to the pending charges. The proffer of this evidence and its reception was not made in pursuit of certain recognized exceptions to the admission of other crimes of a similar nature and the evidence did not support its reception.

7. During the hearing out of the presence of the jury on the renewal of the motion to suppress, appellant desired to take the witness stand. Counsel wanted a ruling from the Court as to the limit of the

cross-examination. No ruling was given which would have limited the cross-examination of appellant to the matters testified to on direct. In view of the fact that the proffer of testimony was only to be on one aspect of the motion to suppress and not on the entire merits of the case, appellant submits that the ruling of the Trial Court of error.

8. Appellant contends that the Trial Court erred in admitting into evidence the alleged statements of appellant to the police at the time the narcotics comprising Counts were allegedly seized at the apartment on Chesapeake Street. In view of the contended unlawful search and seizure as set forth in Paragraph One, anything which flowed from the search and seizure would be inadmissible, including any alleged statements from the appellant.

Wherefore, appellant prays that this petition be granted.

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This is to certify that this petition is filed in good faith and not for the purpose of delay.

William J. Garber
Attorney for Appellant